Surgener Electric, Inc. d/b/a McKee Electric Company *and* International Brotherhood of Electrical Workers, Local 428, AFL–CIO. Case 31–CA–27113

February 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

This case centers on whether the Respondent unlawfully failed to consider for employment and/or refused to hire 15 journeyman electricians because of union animus. For the reasons discussed below, we find violations of Section 8(a)(3) of the Act as to both issues and order instatement and backpay for all 15 unlawfully rejected applicants.[1]

Background

The Respondent is an electrical contractor in the building and construction industry. In the fall of 2004,[2] the Respondent was awarded a contract for a large project in Bakersfield, California. The Respondent employed the assistance of two outside staffing companies, Staffmark and Outsource, to assist in hiring electricians for this project.

The Respondent's CEO, Lester Surgener, contacted Staffmark in September 2004. At that time, Surgener told Staffmark's branch manager, Jane Corvett, that he was displeased with the services of Outsource because it continually sent him applicants who were union members and/or unqualified. Surgener requested that Corvett forward the names of qualified applicants to Respondent's representative Larry Hansen, who would be making the decision on which applicants to hire. In October 2004, Staffmark forwarded the resumes of eight electricians to the Respondent. In a subsequent telephone discussion, either Surgener or Hansen[3] told Staffmark's staffing specialist, Kelly Richardson, that none of these individuals would be interviewed "because they were union people."

In mid-November, Outsource referred five more applicants—Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, and Ronny Jungk—to the Respondent. On November 15, four of these applicants went as a group to interview with Hansen; the fifth applicant interviewed the next day. At their interviews, all five applicants wore union clothing or paraphernalia and openly acknowledged that they were union organizers. Hansen allowed all five applicants to fill out employment applications and interviewed each. Hansen acknowledged during the interviews that each of the applicants was qualified to do the work, but informed them that none would be hired because they were union members and would try to organize the other employees.

Also on November 15, Outsource[4] faxed the resumes of three other electricians—Kevin Cole, Tony Cook, and Mike Stein—to the Respondent. There is no record evidence that any of the resumes indicated union affiliation.[5] The Respondent did not hire or interview any of the three.

On November 19, Union Representative Larry Adams gave Staffmark representative, Richardson, the names and resumes of seven electricians, which Richardson, in turn, forwarded to the Respondent.[6] Each resume indicated that the individual was a union organizer and/or was seeking a position "as a Journeyman Electrician and to educate and organize employees into the I.B.E.W." On December 21, when Adams telephoned Richardson to follow up, Richardson told Adams that the "client" (i.e.,

[1] On October 19, 2005, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings and conclusions as modified and to adopt the judge's recommended Order as modified and set forth in full below.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Unless otherwise noted, all dates refer to 2004.

[3] Although she was unsure with whom she spoke specifically, Richardson's credited testimony is that this statement was made either by Surgener or by Hansen.

[4] The judge inadvertently identified the company that forwarded the resumes as Staffmark.

[5] The resumes of Cole and Stein, which were entered into evidence, contain no indication of union status. The General Counsel sought to introduce into evidence a copy of Cook's resume, which indicated that he was employed by the Union until October 2004. The judge rejected the exhibit for lack of foundation, however, because there was no evidence that this resume was in fact the one sent to the Respondent. The Respondent does not claim that it never received Cook's resume.

[6] The seven resumes were for Brett Garcia, Roberto Fajardo, Raymond MacNeill, Maria Ordaz, Jess Saucedo, Frank Soares, and Anthony Urzanqui.

the Respondent) would not hire union members.[7] About that same time, Richardson placed an employment ad to obtain additional applicants for the Respondent. The ad specifically stated that the job was "nonunion only."

On December 22, Adams called Staffmark Manager Corvett to complain about the "nonunion" requirement posted in the ad. Following her discussion with Adams, Corvett telephoned Surgener and told him that Staffmark could only recruit based on employees' qualifications and not on their nonunion status. At Surgener's request, Corvett faxed over the seven resumes previously sent by Richardson in November. The Respondent did not interview or offer employment to any of the seven individuals whose resumes were sent over.

Violations of Section 8(a)(3)

We affirm the judge's finding, for the reasons stated by the judge, that the Respondent violated Section 8(a)(3) of the Act by unlawfully refusing to consider the 15-named individuals for employment because of their union membership. The General Counsel has excepted to the judge's failure to find that the Respondent also violated Section 8(a)(3) by refusing to hire these 15 individuals. We find merit to the General Counsel's exception for the following reasons.

In refusal to hire cases, "the General Counsel must establish that (1) the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience and training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. . . . Once the General Counsel has met this burden, the employer must show that it would have made the same hiring decisions even absent the applicants' union affiliation." *Jesco, Inc.*, 347 NLRB No. 92, slip op. at 3 (2006) (citing *FES*, 331 NLRB 9, 12 (2000), affd. 301 F.3d 83 (3d Cir. 2002)).

The first two criteria are not in issue, since the Respondent acknowledges that it was hiring journeymen electricians throughout the relevant time period[8] and does not dispute that each of the applicants had experience and training relevant to the open positions. The third factor, antiunion animus, is established by the credited evidence that both CEO Lester Surgener and Larry Hansen, the person tasked with reviewing prospective applicants for Respondent, openly stated that the Respondent would not hire union members.

The Respondent asserts that we cannot find unlawful motivation with respect to its failure to hire two of the applicants, Tony Cook and Kevin Cole, because their resumes did not indicate any union affiliation. It is well established, however, that even where an employer is not aware of an individual's actual union status, discrimination aimed at "suspected" union activists is unlawful. See, e.g., *Niblock Excavating, Inc.*, 337 NLRB 53, 68–69 (2001) (finding unlawful motivation where father of applicant Taylor was openly prounion, based on employer's suspicion that Taylor might also support union); *WXGI, Inc. v. NLRB*, 243 F.3d 833, 843 (4th Cir. 2001) (where two employees were abruptly terminated within days of other employees' open organizing efforts, the fact that they "were not as involved in the unionizing effort is of little consequence . . . the four discriminatees were viewed as a clique and, in any event, the Board need not show that the employer knew of any particular employee's union involvement to show that the employer acted out of union animus"). The resumes of both Cook and Cole were sent to the Respondent by Outsource, the *same staffing company* that Surgener complained kept sending him "union applicants." Moreover, both resumes were faxed to the Respondent *the same day* that four other applicants—also referred by Outsource—were told by Hansen that they would not be hired because of their union affiliation. In these circumstances, we find it reasonable to conclude that Cook and Cole were communally "swept into the unlawful group" refusal to hire union supporters by association, if not otherwise. Cf. *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (where individuals are "swept into the unlawful group discharge . . . proof of the Respondent's knowledge of their actual, individual conduct is not necessary for us to find their discharges unlawful as well").[9]

[7] Although Richardson did not identify the name of the client to Adams, she testified that the client she was referring to was the Respondent.

[8] The Respondent hired approximately 26 journeyman electricians between November 15 and December 22, and another 34 electricians after that date.

[9] Our dissenting colleague points out that Outsource also sent nonunion applicants to the Respondent and that the Respondent did not make "a blanket decision to refuse to hire persons simply because they are referred by Outsource." Neither fact, however, negates the strong inference of discrimination here, based on the particular circumstances surrounding the referral and rejection of Cook and Cole. It may be true, as the dissent suggests, that the Respondent neither believed that *every* applicant referred by Outsource was affiliated with the Union, nor decided to avoid the risk of hiring union applicants by rejecting *all* applicants referred by Outsource. But the evidence clearly demonstrates the Respondent's antiunion animus and its corresponding concern about Outsource-referred applicants. The timing of the refusal to hire Cook and Cole in relation to the Respondent's avowedly discriminatory rejection of union applicants also referred by Outsource persuades us that the Respondent's rejection of Cook and Cole was simi-

Under *FES*, the burden therefore shifted to the Respondent to show that it would not have hired these applicants even in the absence of their union affiliation. *FES,* supra, 331 NLRB at 12. We agree with the judge that the Respondent did not meet its burden.

With respect to the five applicants who were rejected during their interviews with Hansen, the Respondent asserts that it would not have hired Larry Adams because he engaged in misconduct during an earlier organizing drive and that it was justified in not hiring the other four individuals because they named Adams as a reference on their application forms. Hansen's contemporaneous admission that none of these five would be hired solely based on their union status, however, is fatal to this post-hoc justification. Thus, an asserted justification fails where "the Respondent did not in fact rely on [it] when it rejected the discriminatees." *JESCO, Inc.*, supra, 347 NLRB No. 92, slip op. at 4–5 ("The Respondent cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation."). Accord: *Commercial Erectors, Inc.*, 342 NLRB 940, 944 (2004); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Additionally, the judge found that Adams did not engage in the misconduct of which he was accused. Cf. *Union Square Theatre Management,* 326 NLRB 70, 78 (1998) (defense fails where evidence did not support claim that employee took or copied confidential document to give to the union).[10] It follows that if the Respondent's purported justification fails as to Adams, it also fails with respect to the four applicants who listed Adams as a reference.

The remaining justifications are similarly deficient. For the reasons stated by the judge, we agree that the Respondent failed to establish that filed application forms and interviews were a prerequisite to consideration for employment.[11] Furthermore, having summarily rejected the applicants on the basis of their union status without interviewing them or giving them the opportunity to file applications, the Respondent cannot now be heard to complain about the lack of completed employment applications. *Jesco, Inc.*, supra, 347 NLRB No. 92, slip op. at 3.

We also reject as pretext the Respondent's claim that it did not hire eight of the applicants who were referred through Outsource because of exorbitant contract costs. In addition to relying on the reasons given by the judge, we find it telling that the Respondent never terminated its relationship with Outsource and actually signed a staffing agreement with the firm on November 23, several days *after* it unlawfully rejected all eight Outsource applicants.

AMENDED REMEDY

Both the General Counsel and the Respondent filed exceptions to the judge's remedy and recommended Order.[12] The General Counsel excepts to the judge's failure to order instatement and backpay for two discriminatees who admitted falsifying information on their resumes and/or employment applications. The Respondent excepts to the judge's failure to take into consideration that the duration of the work project for which it was hiring

larly motivated by antiunion animus—whether it knew that Cook and Cole were affiliated with the Union, suspected that they were, or simply did not want to take any chances.

We are not persuaded by the Respondent's further argument that because it hired some individual applicants who were union members, it cannot be found to have acted from union animus. There is no evidence that the Respondent knew of or suspected the union status of these individuals when it hired them. In any event, "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). Accord: *WXGI, Inc. v. NLRB*, supra, 243 F.3d at 844; *Clark & Wilkins Industries, Inc. v. NLRB*, 887 F.2d 308, 316 fn. 19 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990); *NLRB v. Centra, Inc*., 954 F.2d 366, 374 (6th Cir. 1992).

[10] According to the Respondent, Adams attempted to get one of its employees to steal personnel files during a 2003 organizing drive. Although the Respondent filed criminal charges against Adams, the sheriff's department declined to act on the charges because there was no evidence that any personnel files were taken. The Respondent also relies on a statement given in 2003 by the employee in question. At trial, however, the employee recanted his earlier statement, asserting that it was procured under the duress of potential job loss. The credited testimony indicates that Adams never asked for copies of the personnel files, but only for the names and addresses of employees, without any direction as to how that information would be obtained. The Respondent does not claim that such a request would have constituted misconduct justifying a failure to hire. In any event, the evidence indicates that the employee whom Adams asked to retrieve the information would have had access to it "in the 'normal course of work activity and association.'" *Union Square Theatre Management,* 326 NLRB at 78 (quoting *Ridgely Mfg. Co.,* 207 NLRB 193, 196–197 (1973), enfd. 510 F.2d 185 (D.C. Cir 1975)). Absent circumstances not present here, both the gathering of that information at the request of a union agent and any disclosure to that agent accordingly fall within Sec. 7 protected conduct. *Ridgely Mfg. Co.,* 207 NLRB at 196–197; *New Process Co.,* 290 NLRB 704, 734 (1988); *Gray Flooring,* 212 NLRB 668, 669 (1974).

[11] We further rely on Surgener's admission that on other occasions he had asked the staffing companies to follow up with an applicant solely on the basis of a resume.

[12] In addition to the specific modifications set forth in the text below, we also amend the remedy section of the judge's decision to provide that interest on the discriminatees' make-whole awards is to be computed as in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). We shall also modify the judge's recommended Order to include a records-expunction provision and the customary remedial language and time limits set forth in our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997).

in the fall of 2004 may affect the ultimate backpay and instatement award. We find merit to both exceptions.[13]

With respect to the General Counsel's exception, the judge found that two of the discriminatees, Ronny Jungk and Mike Stein, purposely falsified information regarding their employment history in order to obtain jobs with the Respondent. The Respondent's employment application forms specifically state that "[f]alsification of any part of the employment application will result in disqualification of an individual for employment. If a new hire is found to have completed an application purposely with the intention of being hired based on erroneous information or submitted any false document, he/she will be terminated from employment." The record does not establish, however, at what point the Respondent became aware of Jungk's and Stein's misrepresentations or whether the Respondent consistently enforced its policy concerning falsification of employment applications. Accordingly, we will order both instatement and backpay for Jungk and Stein, leaving it to the compliance stage to determine to what, if any, extent these remedies should be limited. See *ADS Electric Co.,* 339 NLRB 1020, 1020 fn. 3 (2003), and cases cited therein.

We also leave to compliance the determination of whether the time-limited nature of the Bakersfield project would have resulted in the discriminatees being laid off for lack of work at some point in time, thereby rendering instatement inappropriate and tolling backpay. Under extant Board law, determination of this factual issue appropriately is left to the compliance stage. *Dean General Contractors,* 285 NLRB 573, 573 (1987).[14]

[13] We find no merit to the Respondent's other exception that the four discriminatees who tape recorded their employment interviews thereby forfeited their rights to remedial relief. We find the claim that such tape recordings violate state criminal laws undercut by the Respondent's failure to file criminal charges or to cite any precedent for the proposition that a California court would find the tape recordings a violation of state privacy laws in the circumstances present here. Cf. *Braun Electric Co.,* 324 NLRB 1, 3 fn. 3 (1997) (rejecting argument that videotaping of employment application efforts by union salts not protected because employer "has not shown that videotaping was illegal under California law"). We decline to make an independent interpretation regarding the applicability of the state criminal statute in the present circumstances without the benefit of any prior state interpretation or ruling on the matter. In rejecting the Respondent's argument, however, we disavow the judge's statement that the Board in *Braun Electric,* supra, held such taping to be protected activity. The Board expressly declined to rule on that issue. 324 NLRB at 3 fn. 4.

[14] As stated in fn. 2 of *Construction Products*, 346 NLRB No. 60 (2006), and *Cheney Construction*, 344 NLRB No. 9 (2005), Chairman Battista recognizes that *Dean General* represents current Board law but he has concerns as to whether that case was correctly decided. Member Kirsanow has similar concerns. Accordingly, although the Chairman and Member Kirsanow agree that the issue of how long the discriminatees would have remained employees of the Respondent if they had properly been hired is to be left to compliance, they also leave to compliance the related issue of which party bears the burden of proof on this matter. The resolution of these issues will determine the amount of backpay and whether instatement continues to be appropriate.

ORDER

The National Labor Relations Board orders that that the Respondent, Surgener Electric, Inc. d/b/a McKee Electric Company, Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire job applicants because of their membership in, or affiliation with, the Union or any other labor organization.

(b) Refusing to consider for employment job applicants because of their membership in, or affiliation with, the Union or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, Tony Cook, Brett Garcia, Robert Fajardo, Ronnie Jungk, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Mike Stein, Frank Soares, and Anthony Urzanqui in the positions for which they applied or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights and privileges they would have enjoyed if they had been hired, if necessary terminating the service of employees hired in their stead.

(b) Make whole all of those individuals identified in subparagraph (a) for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision, as modified herein.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire or to consider for employment Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, Tony Cook, Brett Garcia, Robert Fajardo, Ronnie Jungk, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Mike Stein, Frank Soares, and Anthony Urzanqui and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel re-

cords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bakersfield, California, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 2007

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

I do not agree that the General Counsel has shown a violation as to Cook and Cole. The evidence does not establish that the Respondent knew that Cook and Cole were union adherents. The majority's reasoning to avoid this problem does not withstand scrutiny. Indeed, the majority's reasoning is a "hodge-podge" of different theories, none of which is supported by the evidence.

The majority first asserts that the Respondent "suspected" that Cook and Cole were union adherents. The majority subsequently asserts that the Respondent discriminated against others, and that Cook and Cole got swept in with them.

The first theory is based on the fact that the Respondent complained that Outsource kept sending it "union applicants." However, this is not the same as saying that Outsource sent only "union applicants." Indeed, General Counsel Exhibit 35 shows that Outsource also sent nonunion applicants. Thus, the Respondent could not infer, from the Outsource referral, that Cook and Cole were union adherents.

The second theory is based on cases where a respondent makes a discriminatory decision (e.g. to lay off a department) because of union activity within that department. In such cases, everyone affected by the decision (whether a union adherent or not) is treated as a discriminatee. By contrast, the General Counsel does not here assert, and the evidence does not show, a blanket decision to refuse to hire persons simply because they are referred by Outsource. Indeed, the Respondent continued its relationship with Outsource even after the discriminatory conduct involved herein.

Dated, Washington, D.C. February 28, 2007

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire or consider for employment job applicants because of their membership in, or affiliation with, the International Brotherhood of Electrical Workers, Local 428, AFL–CIO or any other labor organization.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer immediate full employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, Tony Cook, Brett Garcia, Robert Fajardo, Ronnie Jungk, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Mike Stein, Frank Soares, and Anthony Urzanqui in electrician positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges that they would have enjoyed had they been hired.

WE WILL make the named individuals whole for any loss of earnings and benefits that they have suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusal to hire or to consider for employment the named individuals and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful refusal to hire them will not be used against them in any way.

SURGENER ELECTRIC, INC. D/B/A MCKEE ELECTRIC COMPANY

Rodolfo L. Fong-Sandoval, Esq., for the General Counsel.
Howard A. Sagaser, Esq., of Fresno, California, for the Respondent.
Larry Adams, Organizer, of Bakersfield California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on July 11, 12, and 13, 2005, on the General Counsel's complaint which alleges that in violation of Section 8(a)(3) of the National Labor Relations Act (the Act), the Respondent refused to consider for employment 15 qualified individuals because of their known affiliation with the Charging Party.

The Respondent generally denied the substantive allegations in the complaint, and affirmatively contends, without offering factual support, certain constitutional violations and the running of the 10(b) limitation period. The Respondent also contends it had valid reasons for not considering Larry Adams or anyone whom he recommended, all of which will be discussed below.

Upon the record as a whole, including my observation of the witness, briefs and arguments of counsel, I hereby make the following findings of fact and conclusions of law

I. JURISDICTION

The Respondent is a California corporation with an office and place of business in Bakersfield, California, from which it has been engaged in the building and construction industry as an electrical contractor. In the course and conduct of this business, it annually derives gross revenues in excess of $500,000 and receives directly from points outside the State of California, goods, products, and materials valued in excess of $2000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Local No. 428, International Brotherhood of Electrical Workers, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts in Brief

For many years, various locals of the IBEW have sought to organize employees by having current members (sometimes employees of other companies, sometimes employees of the local itself) apply for job openings. This process is often referred to as "salting" and is often resisted by the targeted employer, usually on grounds that the applicants are not bona fide employees seeking work. This is one such case, but, as always, has its own unique facts.

In late 2004,[1] in order to staff a large project in Bakersfield, the Respondent sought the services of a temporary employment agency called Outsource. Outsource in fact referred prospective employees to the Respondent, and specifically on November 15, referred five applicants, including union organizer Larry Adams.

However, the Respondent's CEO (or General Manager), Lester Surgener, was apparently unhappy with Outsource and contacted another temp agency called Staffmark.[2] On September 27, Surgener met with Staffmark Branch Manager, Jane Morgan Corvett. According to Corvett, whose testimony on all material issues I credit.[3] Surgener told her "he was displeased with a company called Outsourcing and they were currently sending him resumes and what-not and so he was looking to partner with another staffing service because the people that the other service was sending him were not qualified, were union applicants, and also, he did not care for their contact at that service any longer."

[1] All dates are in 2004, unless otherwise indicated.

[2] Counsel for the Respondent argues that documents indicate that Staffmark was retained before Outsource, a fact assertion I find irrelevant and therefore unnecessary to resolve.

[3] Corvett, and fellow Staffmark employee, Kelly Lee Richardson, have no stake in the outcome of this matter and no longer have any kind of a relationship with any of the parties—employers or employees. Further, they both gave believable accounts of their conversations with the principals of the Respondent. Finally, observing their relative demeanor, I find Corvett and Richardson credible and Surgener unworthy of belief. I credit them generally, and specifically, where there is a direct dispute between what they testified Surgener said in a particular conversation and what he testified he said, I discredit him and credit them.

Corvett testified that the general process her company uses when given an order for employees is to search her database, then submit ads in the local and perhaps distant newspapers (such as Las Vegas in this case) and to post the openings on CalJOBS. When she gets responses, she will fax the applicant's resume to her client to see if the client is interested, and if so she will call the applicant in for a drug and safety test and will then line up an interview for the applicant with her client. Thus Surgener told her in the September 27 meeting "when I had a qualified applicant to get it over to Larry (Hansen) and Larry was the person who would interview and make the decision."

Kelly Lee Richardson started with Staffmark on October 18. In response to the first CalJOBS ad, Staffmark received eight resumes which she faxed to the Respondent on or about November 19. She followed up with a call to either Larry or Lester (she was unable to recall which, but was "positive it was one of the two") and "I was told at that time that they would not interview any of these people because they were union employees."

After this conversation, Richardson placed a second CalJOBS ad which stated, under job duties, "NonUnion only." On December 22, Adams called Corvett to complain about the nonunion requirement in the CalJOBS ad. She in turn called Surgener telling him "that it was my understanding that he had specified to the girls in the office who, in turn, were recruiting based on his non-union requirement and that we could not do that and so we have to recruit for him off of qualifications, and he then said that he refused union applicants, and I said, well, then I cannot do business that way and then he said, well, I'll speak with my attorney and have him call you, which I never received a phone call."

Via Outsource, on November 15 and 16, Adams, Jeff Bode, Joe Furino, Mark Satterfield, and Ronny Jungk, were interviewed by Hansen. During these interviews, each of which was surreptitiously recorded by the applicants, Hansen said that the applicant was well qualified and would be hired but for the fact he was a union member and would try to organize other employees. The essence of Hansen's statements to these applicants was not denied by him. I believe that he specifically told the prospective employees that they are qualified (which is undenied by the Respondent) and that they would be hired but for their union affiliation—that for them to be hired and attempt to organize other employees would be a problem that the Respondent "is going to fight you tooth and nail." (Transcript of Adams' interview with Hansen.)

On November 15, Richardson faxed to the Respondent the resumes of Kevin Cole, Tony Cook, Mike Stein, and on November 19, faxed the resumes of Brett Garcia, Robert Fajardo, Raymond Mac Neil, Maria Ordaz, Jess Saucedo, Frank Soares, and Anthony Urzanqui. These resumes were refaxed by Corvett on December 22, the Respondent having claimed that it had not received them earlier. Indeed, at the hearing counsel seemed to represent that the Respondent never received these resumes—that "Respondent didn't have them." All these resumes indicated the applicant had union affiliation. None were interviewed by the Respondent.

During the period November/December, employees whose resumes did not indicate union affiliation were hired—two through Outsource and two through Staffmark.

B. Analysis and Concluding Findings

1. The violation of Section 8(a)(3)

Unquestionably the Respondent had many openings for qualified electricians during the period November 2004/January 2005, and in fact hired 60. Also unquestionably, the 15 individuals listed in the complaint were qualified and that the resume of each, submitted to the Respondent by Outsource or Staffmark, stated the individual's union affiliation. None of the 15 was hired, whereas at least four individuals whose resumes did not state union affiliation were hired during this period. I find that Surgener told a Staffmark employee that the Respondent would not interview those whose resumes showed union affiliation and he told the Staffmark branch manager that "he refused union applicants." The Respondent's predisposition to deny employment to union members was confirmed during Hansen's interviews of Adams, et al.

On these facts it is abundantly clear that the Respondent refused to consider for employment individuals who had demonstrated union membership and it thereby violated Section 8(a)(3) of the Act. E.g., *FES,* 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir. 2002).

2. The Respondent's Defenses

Counsel for the Respondent offered several defenses, none of which I find meritorious either factually or legally. They will be considered seriatim as they appear in his brief.

Counsel contends that the five individuals interviewed by Hansen tape recorded the interviews without Hansen's consent and thereby violated a privacy act section in the California Penal Code, sec. 630–637.6. He then relies on Surgener's testimony that if this criminal activity had been known, they would not have been hired or would have been discharged. This assertion is self-serving and after the fact. Nor would it make these employees unemployable for purposes of the remedy here. The Board has held that taping of job interviews is protected activity and, therefore, could not be a basis for refusing to hire an applicant. *Braun Electric Co.,* 324 NLRB 1 (1997).

Further, as quoted by counsel, this section covers recordings "without the consent of all parties to a confidential communication." There is simply no basis to conclude that an employment interview could be considered a "confidential communication."[4] These were not "personal" conversations Hansen was having with Adams and the others. He was interviewing them on behalf of his employer for purposes of potential employment. Counsel cited no California case holding such interviews to be "confidential communications."

The second defense as to the five who were interviewed begins with an allegation that some 20 months prior to the events here Adams attempted "to get an employee of McKee Electric

[4] Transcripts of these recordings were offered into evidence and rejected (except for that of Adams to which there was no objection), not because of the alleged violation of the California Penal Code but because the General Counsel did not give the Respondent a reasonable amount of time to verify their authenticity.

to steal documents and/or information from McKee's personnel files." For this reason, Surgener testified, he would never hire Adams or anyone whom Adams recommended, meaning, for purposes of this case, the other four.

This situation arose from an apparent attempt by Adams in January 2003, to organize the Respondent's employees during which he asked Rodney York to get him the names and addresses of employees, if he could do so without getting into trouble. York was an electrician who at the time was on disability and was working in the office. Surgener procured from York a statement to the effect that Adams had asked him to steal personal files and then Surgener called in the Sheriff's Department. There was no serious investigation and the matter was dropped.

York was called as a witness by the Respondent. While admitting he wrote the statement at Surgener's request (being afraid for his job) he denied that in fact Adams asked him to get anything from employees' personal files. Adams also denied the substance of York's earlier statement. I find that Adams did not solicit an employee to engage in criminal activity, but was engaged activity protected by the Act. It appears that Surgener was using his position in an effort to build a case against a known union organizer as early as 2003. Since, as noted above, I do not generally believe Surgener, I conclude that his assertion is bogus and not a legitimate reason to refuse employment to Adams or those who put Adams as a reference on their resumes.

By way of an additional defense, because these five were referred by Outsource, and because Outsource was too expensive, they would not have been hired. I reject this assertion based on the essentially uncontroverted testimony that Hansen told them they would not be hired because of their union affiliation.

Hansen is the individual who takes applications and interviews prospective employees. He testified that Surgener does all the hiring, however, Hansen clearly has the authority to effectively recommend hiring and does so. On this basis he is clearly a supervisor and, for purposes of hiring employees at least, an agent of the Respondent. As such his statements bind the Respondent and show a predisposition by the Respondent not to hire union members.

As to the remaining 10, the Respondent argues that they never filed applications and therefore could not have not been considered. This argument is based on the assertion that the Respondent's inviolate hiring procedure required all prospective employees to file applications with the Respondent at its office. None of the 10 did so. I reject this argument.

Whatever the Respondent's prior hiring practice, for the purpose of staffing the Bakersfield job the Respondent retained employment services and therefore clearly held its standard practice in abeyance. On retaining Staffmark, the hiring procedure was for Staffmark to find prospective employees and then fax their resumes to the Respondent. If the Respondent stated an interest in such a prospect, then Staffmark would screen and test the prospect, and if this was satisfactory, would then arrange for an interview with the Respondent. The reason none of the 10 filed an application with the Respondent or came in for an interview was because the Respondent stopped the process. Staffmark was told that none of these 10 would be considered because of their union affiliation. The Respondent's technical argument is without merit and its refusal to further consider the 10 was violative of Section 8(a)(3).

IV. REMEDY

Having found that the Respondent refused to consider for employment 15 qualified applicants because of their membership in the Union, I shall recommend that the Respondent be ordered to cease and desist such activity and to offer employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, and Tony Cook, make them whole for any losses which they may have suffered as a result of the discrimination against them including backpay commencing on November 15, 2004, and Brett Garcia, Robert Fajardo, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Frank Soares, and Anthony Urzanqui with backpay commencing on November 19, 2004, until the date they are hired or reject employment pursuant to the formula set forth in *F. W. Woolworth,* 90 NLRB 252 (1950), with interest.

Although some applications contained minor errors and/or were out of date, I do not consider these facts fatal to this remedy. However, material information on the applications of Ronny Jungk and Mike Stein was false. Jungk had never worked for any of the companies listed as previous employers and Stein had never worked for the most recent employer he listed. While this false information was not a factor in the Respondent's refusal to consider them, I conclude such goes beyond the trivial and as a matter of good policy, they should not be given an offer of employment or backpay. It was their choice to falsify their resumes.

Upon the foregoing findings of fact and conclusions of law, I make the following recommended[5]

ORDER

The Respondent, Surgener Electric, Inc., d/b/a McKee Electric Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment qualified applicants because of their membership in, or affiliation with, the Union or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, Tony Cook, Brett Garcia, Robert Fajardo, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Frank Soares, and Anthony Urzanqui and make them whole for any losses they may have suffered as provided in the remedy section above.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its each of its facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees of the Respondent at any time since March 15, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, San Francisco, California October 19, 2005

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered that we post this notice and comply with its terms.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for employment or hire qualified applicants for employment because of their membership in or affiliation with the Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, Tony Cook, Brett Garcia, Robert Fajardo, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Frank Soares, and Anthony Urzanqui and make them whole for any losses they may have suffered as a result of the discrimination against them, with interest.

SURGENER ELECTRIC, INC., D/B/A MCGEE ELECTRIC COMPANY